UNITED STATES OF AMERICA
THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D.C.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 18 (PRECISION PIPELINE) — Case No. 09-CB-109639

and

STEPHEN A. WILTSE

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 18 (ROCKFORD CORPORATION) — Case No. 09-CB-118659

and

GARY LANOUX

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 18'S ANSWERING BRIEF TO THE GENERAL COUNSEL'S EXCEPTIONS AND SUPPORTING BRIEF

Pursuant to Section 102.46(d) of the Board's Rules and Regulations, now comes Respondent, International Union of Operating Engineers, Local 18, by and through counsel, hereby respectfully submits its Answering Brief in response to the Counsel for the General Counsel's Exceptions and Brief in Support.

Respectfully Submitted,

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ANSWERING BRIEF TO THE COUNSEL FOR THE GENERAL COUNSEL'S EXCEPTIONS AND SUPPORTING BRIEF

I. Introduction

By its exceptions, Counsel for the General Counsel ("CGC") seeks to have the National Labor Relations Board ("Board") reverse the factual and legal findings of Administrative Law Judge David I. Goldman's Decision and Recommended Order. However, the CGC has misstated the evidence and presents a narrative not supported by the record. Despite the overwhelming evidence to the contrary, the CGC has maintained throughout the present matter that: 1) internal Union documents known as "pre-job reports" were the source of the Charging Parties' terms and conditions of employment; and 2) the Charging Parties enunciated a legitimate reason for seeking the pre-job reports. On these bases alone, the CGC contends that the Charging Parties were entitled to the pre-job reports. In support of its argument, the CGC mistakenly relies upon two Board cases which are clearly inapplicable to the present matter. However, the record evidence demonstrates beyond surfeit that under relevant Board law: 1) the pre-job reports are not the source of the Charging Parties' terms and conditions of employment, but are mere memorializations of the same under the applicable collective bargaining agreement; and 2) the Charging Parties lacked a credible reason for their request. Rather, under Supreme Court and Board precedent, Respondent International Union of Operating Engineers, Local 18 ("Local 18" or "Union") has not acted arbitrarily, but established a credible confidentiality interest in refusing to furnish the Charging Parties the pre-job reports. Therefore, ALJ Goldman held that Local 18 did not violate Section 8(b)(1)(A) of the National Labor Relations Act ("Act"). The CGC did, however, not take exception to, or otherwise criticize the basis – both legally and factually – upon which ALJ Goldman found that Local 18 acted reasonably. Accordingly, the CGC's

exceptions are without merit and ALJ Goldman's Decision and Recommended Order should be upheld.

II. Statement of Facts

A. The National Pipeline Agreement

The National Pipeline Agreement ("NPA") is a collective bargaining agreement ("CBA") that covers cross-country pipe line, stationary pipe line, and pipe line maintenance work. (Jt. Exh. 1, Art. I(A); TR 66: 2-5.) The parties to the NPA are the Pipe Line Contractors Association ("PLCA") and the International Union of Operating Engineers. (Jt. Exh. 1, preamble; TR 297: 3-15.) The PLCA represents various contractors throughout the United States in various stages of pipe line construction. (TR 64: 5-7; TR 296: 3-12.) PLCA members are bound to the terms and conditions of the NPA. (Jt. Exh. 1.) The IUOE representatives appointed to bargain with the PLCA are IUOE General President James Callahan and five representatives he is solely authorized to designate. (TR 64: 24-25; TR 65: 1; TR 67: 3-18.) The PLCA representatives appointed to bargain with the IUOE are the PLCA's President and specifically appointed PLCA members constituting the PLCA's labor board. (TR 65: 2-7.) This bargaining group as a whole is known as the pipe line committee (TR 66: 18-25; TR 67: 1-3.) All of the terms and conditions contained within the NPA, including, *inter alia*, wage rates, are negotiated by the pipe line committee. (TR 66: 12-21.) The only union-side entity with the final authority to interpret any term and condition within the NPA is IUOE General President James Callahan. (TR 67: 21-25.)

Art. I(A) of the NPA applies to all covered work within the IUOE's craft and geographical jurisdiction, which includes all lower 48 states of the United States, divided into four regions – Northwest, North Central, Southern, and Western. (Jt. Exh. 1, p. 79; TR 65: 8-13.) All covered work performed by PLCA contractors or NPA signatories within the IUOE's

jurisdiction "shall be assigned only to Operating Engineers represented by the Union[.]" (Jt. Exh. 1, Art. I(J).) Thus, individuals employed by PLCA contractors are specifically members of the IUOE. Moreover, "[a]ll of the work covered by this Agreement shall be done under and in accordance with the terms and conditions of this Agreement, whether done by Employer or any subcontractor of said Employer" (Id., Art. I(E)), and that the Agreement "shall supersede all other agreements between Employer and any local of the Union for any work covered herein and described above." (Id., Art. I(M).)

When a PLCA member obtains a job covered by the Agreement, it is required to inform the IUOE of the job's parameters. (Jt. Exh. 1, Art. II(C); TR 300: 7-18.) The IUOE then identifies to the PLCA member which IUOE local union has geographical jurisdiction for the obtained job. (Id.) Subsequently, the PLCA member is required to contact the applicable IUOE local union to hold a pre-job conference. At this conference, the particular job's manpower, awarding gas company, equipment, work week length, job length and wage rate parameters are determined consistent with the NPA. (Jt. Exh. 1, Art. II(D); TR 300: 19-25; TR 301: 1-6; TR 302-318.) Other parameters discussed at the pre-job conference, such as drug and safety policies and travel-time pay between jobsites and their designated point of departure (known as a "warehouse"), must fully comply with terms and conditions of the NPA; *to wit*, Arts. V and XIV, respectively. (TR 335: 6-13; TR 80: 1-25; TR 81: 1-11.) These matters are fully discussed with all operating engineers during an orientation at the start of the job. (TR 337: 14; TR 338: 1-3; TR 78: 14-18.) Consequently, the pre-job conference is reduced to a pre-job report which must not add or modify any term or condition of the NPA. (Jt. Exh. 2; TR 71: 1-2, 7-12; TR 301: 13-15) The pre-job report is simply a memorialization of the terms and conditions of employment found within the NPA.

The wage rate determinations are governed by, and merely verify the applicable wage rates contained within the NPA. (TR 68: 1-15; TR 301: 4-6.) Specifically, Appendix A of the NPA (Jt. Exh. 1, pp. 36-74) identifies such rates for work performed in any given state. The wage rates are determined by evaluating two categories: the type of work performed and the particular county of the state in which the job is performed.[1] For example, if one wants to know what the wage rate is for a mechanic performing a job under the auspices of the NPA in Ohio, one needs to identify both the job category and location category. A mechanic's wage rate is categorized as a "Group 1" wage. (Id., p. 36.) If, hypothetically, the job is being performed in Cuyahoga County, Ohio, the wage rate is $40.20, because Cuyahoga County is contained within the "Zone 1" geographical category. (Id., p. 64.) However, if, hypothetically, the job is being performed in Hamilton County, Ohio, the wage rate is $38.37, because Hamilton County is contained within the "Zone 3" geographical category. (Id.)

Ultimately, all pre-job conferences are limited to matters that do not require interpretation of the NPA and no individual employer or IUOE local union may make any demand for any term or condition not covered by the NPA. (TR 71: 1-2, 7-12; TR 335: 1-13.) The IUOE and the PLCA jointly developed the pre-job report in the 1940s when the NPA was first negotiated between the parties. (TR 70: 21-25; TR 71: 1-6, 14-15.) In 2013 alone, nearly 1,700 pre-job conferences were held under the auspices of the NPA. (TR 74: 4-18.)

It has been an ironclad policy by both PLCA members and IUOE local unions to ensure that the pre-job report information remain confidential, as between only the pertinent PLCA member, the IUOE, and the pertinent IUOE local union. (TR 74: 21-25; TR 323: 14-22.) In order to guarantee that jobs performed pursuant to the NPA remain competitive with non-union jobs,

[1] The wage rates also differ by year, but there is no dispute as to the time in which the work was performed by the Charging Parties.

descriptions of the actual pipe line, the gas company awarding the work, the location of the work, the amount of manpower, the type of equipment used, the benefits provided, the length of the work, and the wages remain confidential, even as between PLCA members. (TR 75: 24-25; TR 76: 1-14.) PLCA members may not examine pre-job report generated from jobs created pursuant to the NPA of other PLCA members. (TR 323: 23-25; TR 324: 1-4; TR 334: 18-25.) If this information contained within the pre-job report left the chain of custody between the IUOE local unions and PLCA members, it could potentially end up in the possession of non-union contractors who would have the ability to extrapolate labor costs for a particular job by examining pre-job report information. The non-union contractors could then apply the data to extremely similar future jobs in the same geographic region, tailor their costs accordingly, underbid estimates put forth by PLCA members, and thus undermine the financial and skill advantages of union jobs. (TR 75: 15-23; TR 319-321; TR 323: 4-13.) Unsurprisingly, the information contained in bid sheets used by both union and non-union contractors in order to bid on pipe line construction jobs is functionally equivalent to the information contained in pre-job reports. (TR 321: 21-25; TR 322: 1-7.) If a PLCA member wins a job, all of the information utilized in the winning bid sheet is transferred to the parameters contained within a pre-job reports, as discussed in the pre-job conference. (TR 322: 8-25; TR 323: 1-3.)

The primary purpose of an IUOE local union's involvement for a job covered under the NPA is to provide the requisite manpower. To that end, where the appropriate IUOE local union has already established a valid and non-discriminatory exclusive referral procedure by collective bargaining between itself and contractors in the heavy highway or pipe line industry, the PLCA member is required to utilize that referral procedure. (Jt. Exh. 1, Art. II(M)(1).) While Local 18 utilizes the referral procedures found in its Heavy Highway Agreement (G.C. Exh. 9), it does not

bind any of the PLCA contractors to the terms and conditions contained therein, and neither they nor the PLCA are parties to the Heavy Highway Agreement with the IUOE or Local 18, as stipulated by the parties. (TR 283-291.)

For the period during which the covered job is performed, the PLCA member has the right to make and revise working rules not inconsistent with the NPA to which the IUOE agrees to abide, and "grievances, disputes, differences of opinion and other questions concerning this Agreement" (Jt. Exh. 1, Art. X(A)) must be settled in a matter that is "binding on both parties" (Id., Art. XI(E)); *to wit*, the IUOE and the PLCA/PLCA member. (Id., Art. XI(C).)

B. Charging Party Stephen Wiltse

Mr. Wiltse is the owner of M.O.L. Excavating, a limited liability company ("LLC") licensed in the State of Ohio to perform excavating and demolition, utilizing non-union labor. (L18 Exhs. 5-6; TR 167: 2-19; TR 177: 18-21.) Mr. Wiltse is also the owner of Andy's Back-Hoe, a company that performs excavating and demolition, utilizing non-union labor. (TR 167: 2-19.) M.O.L. Excavating filed its Articles of Incorporation with the Ohio Secretary of State on November 4, 2005. (L18 Exh. 2.) Mr. Wiltse was listed as the company's agent on May 5, 2010 (Id.), and as of March 11, 2014, M.O.L. Excavating was still an actively licensed company. (Id.; TR 158: 15-22.) As recently as August 1, 2013, M.O.L. Excavating had completed a two-year certification with the City of Cincinnati's Small Business Enterprise Program. (L18 Exhs. 3, 5.) Moreover, as of December 23, 2013, M.O.L. Excavating was listed in the Southern Ohio edition of Construction as a pre-qualified active business for the purposes of submitting a bid for demolition jobs in Southern Ohio. (L18 Exh. 4.) Mr. Wiltse acknowledged that the scope of work performed by his two companies encompassed demolition work on a pipeline, and could

not identify any CBAs to which M.O.L. Excavating was bound in performing such work. (TR 168: 13-19; TR 169: 22-25.)

Pursuant to the terms and conditions of the NPA, Mr. Wiltse was dispatched by Local 18's District 4/5 via its referral procedure to the Harrison, Ohio jobsite, under the employ of Precision, a PLCA member. (TR 296: 16-18.) Mr. Wiltse began his employment on May 20, 2013, and remained so employed until May 28, 2013, when he was terminated by Precision. (L18 Exhs. 7-8; TR 178: 19-25; TR 179: 1-4; TR 259-264.) Shortly after commencing work at Precision, Mr. Wiltse was initially terminated for allegedly operating an excavator in an unsafe manner. (TR 108: 11-16.) After notifying Local 18 that he believed his termination was wrongful, Local 18 was able to reinstate him at the Precision job as bulldozer excavator. (TR 108-112.) However, shortly after, Mr. Wiltse was again terminated for allegedly being unqualified to operate a bulldozer. (TR 112: 1-12.) Mr. Wiltse then filed a grievance contesting his termination as wrongful. (TR 108-112; TR 180: 18-25; TR 181: 1-17.) Pursuant to the NPA, the union-side processing of grievances is solely performed by the IUOE. (Jt. Exh. 1, Art. XI.) The first step of the grievance procedure involves a union field representative (id.), and while this may constitute an individual from the local IUOE union in whose geographical jurisdiction the NPA job is taking place, but there is no contractual mandate to do so. Accordingly, Local 18 was responsible for only completing the first step of the grievance process. (TR 63: 18-25; TR 64: 1.)

In the process of having Local 18 file a grievance on his behalf, Mr. Wiltse met with Local 18 officials and requested both a copy of the NPA and a copy of the pre-job report for the Precision job (G.C. Exh. 4) for which he had been employed. (TR 113: 11-17.) Shortly thereafter, Mr. Wiltse met with Local 18 officials to discuss the merits of his grievance. (TR 118:

2-11.) At this meeting, Mr. Wiltse asked for a copy of the NPA and the pre-job report for the Precision job to the extent it pertained to his grievance. (G.C. Exh. 5; TR 129: 5-9.) Local 18 gave Mr. Wiltse a copy of the NPA (TR 131: 7-11; TR 139: 1-7), but did not give him a copy of the pre-job report, stating that the document was unavailable to operating engineers. (G.C. Exh. 5.) [expand] Shortly after this second meeting, Mr. Wiltse again met with Local 18 officials to discuss the merits of his grievance. He again asked for a copy of the pre-job report, and Local 18 again stated that the document was unavailable to operating engineers. (G.C. Exh. 7, p. 3.) At no time during these three meetings did Mr. Wiltse ever express a particular reason as to why he wanted access to the pre-job report. In fact, during his third meeting with Local 18, after Mr. Wiltse speculated in passing as to whether the pre-job report would have any relevance to his contractual rights, Local 18 officials emphasized that his rights were governed by the NPA, of which he had a copy. (G.C. Exh. 7, p. 3.) Upon hearing this statement, Mr. Wiltse acknowledged that he no longer needed the pre-job report as it pertained to his grievance. (Id.)

Because Mr. Wiltse's grievance could not be resolved at the first step (TR 181-183), as the labor organization contractually responsible for processing it, the IUOE commenced investigation of Mr. Wiltse's grievance. (TR 183: 10-17.) The IUOE ultimately determined it lacked merit, and accordingly notified Mr. Wiltse of the same. (Id.)

For the first time at the ULP hearing, Mr. Wiltse claimed that he wanted to see the pre-job report for the Precision job because it "govern[ed] . . . [his] working conditions." (TR 154: 15-23.) He could provide no reasons as to why he believed this to be the case, other than offering the tautology that the pre-job report governed his working conditions and the assertion that the pre-job report was a "legal and binding" "agreement." (Id.) Mr. Wiltse in fact *agreed* that the information generated in a pre-job report, including, *inter alia*, the amount of equipment, the

amount of manpower, and the gas company awarding the work, did not govern his working conditions because such information was irrelevant to the terms of his employment. (TR 190-194.) Further, he agreed that it was only the NPA, which was the sole source of his provisions and conditions of employment, that governed his terms of employment. (TR 192-193.)

Mr. Wiltse also stated that possession of a pre-job report, such as the one generated for the Precision job, would provide him an "obvious benefit" as the owner of non-union M.O.L. Excavating and non-union Andy's Back-Hoe in preparation for future jobs for which he would competitively bid, since such a form would provide him with his competitors' budget and labor costs. (TR 186: 11-22.) Mr. Wiltse also acknowledged that being able to successfully underbid his competitors would reduce their available jobs and harm them economically. (TR 187: 10-16.)

C. Charging Party Gary Lanoux

Mr. Lanoux is a member of Local 18. (TR 202: 15-20.) Pursuant to the terms and conditions of the NPA, Mr. Lanoux was dispatched by Local 18's District 3 via its referral procedure to the Lancaster, Ohio and Washington Courthouse jobsites ("Rockford job"), under the employ of Case Road Boring (L18 Exh. 13; TR 234: 2-19), a subcontractor of Rockford Corporation (TR 235: 8-13), a PLCA member. (TR 296: 19-21.) Mr. Lanoux began his employment on May 22, 2013 (L18 Exhs. 10-11; TR 210: 21-25; TR 211: 1; TR 221: 2-8), and remained so employed until October 19, 2013, when the Rockford job had been completed. (TR 216: 5-17; L18 Exhs. 10B, 11H.) On May 22, Mr. Lanoux purportedly asked a Local 18 steward for a copy of the pre-job report (G.C. Exh. 2) for the Rockford job. (TR 211: 9-13.) Mr. Lanoux alleged that the Local 18 steward represented to him that he could not have the pre-job report. (TR 213: 4-23.) Mr. Lanoux sent an un-dated letter to Local 18 wherein he requested a copy of the pre-job report for Rockford job. (G.C. Exh. 8.) For the first time at the hearing, Mr. Lanoux

claimed that he had an interest in determining his applicable wage rate for the Rockford job, but acknowledged that the source of information he was seeking was solely in the NPA (TR 226: 2-16), of which he stated he received a copy that contained Ohio wage rates pertaining to his job. (TR 227: 5-25; TR 228: 1-10.) At no time prior to the hearing did Mr. Lanoux ever express a particular reason as to why he wanted access to the pre-job report, other than that he believed he was simply entitled to it. (G.C. Exh. 8.)

Pursuant to the terms and conditions of the NPA, Mr. Lanoux was later dispatched by Local 18's District 6 via its referral procedure to the Cadiz, Ohio jobsite, under the employ of CBC Pipeline ("CBC"), a PLCA member. (TR 296: 22-23.) Mr. Lanoux began his employment on November 11, 2013 (L18 Exhs. 10D, 11H; TR 217: 17-24), and remained so employed until November 19, 2013. (L18 Exhs. 10D, 11H.) On November 11, Mr. Lanoux purportedly asked a Local 18 steward for a copy of the pre-job report (G.C. Exh. 3) for the CBC job. (TR 217: 25; TR 218: 1-5.) Mr. Lanoux alleged that the Local 18 steward did not give him a copy of the pre-job report. (TR 220: 3-8.) At no time did Mr. Lanoux ever express a particular reason as to why he wanted access to the pre-job report.

III. Argument

a. Exception No. 1: ALJ Goldman did not err in concluding that the wage rates, benefit payments, 'etc.' found on the Pre-Job Reports are merely taken from the NPA.

ALJ Goldman found that the terms of the NPA, including, *inter alia*, wage rates, are "not negotiated as part of the pre-job conference," but are "taken from the collectively-bargained agreement . . . and then recorded on the pre-job report." (ALJ Dec., p. 17: 30-34.)[2] While the CGC stated that "the terms contained in the Pre-Job Reports sometime differ from the

[2] ALJ Goldman's Decision will hereinafter be cited as "(GC Brief, p. [x])," where [x] refers to the numbered page.

requirements of the NPA," (GC Brief, p. 7),[3] the only basis upon which the CGC supports this exception is the erroneous contention that the wage rates contained within the pre-job report differ from those contained within the NPA. (Id.) However, this statement is categorically wrong. The CGC first erroneously contends that "[m]echanic pay rates on the Rockford Corporation job [as identified in the pre-job report] differed dramatically from the NPA requirement that mechanics be paid 'Group 1' wages." (GC Brief, p. 7.) The CGC next falsely [states] that "[a]nother group of employees on the Rockford Corporation, CBC, Inc. and Precision Pipeline jobs, which is ordinarily paid Group 3 wages, was to be paid Group 2 wages with the performance of unspecified additional duties." (Id.) These two statements reflect the CGC's fundamental miscomprehension and misreading of the record and the NPA's plain and straightforward language. The Rockford, CBC, and Precision pre-job reports identify their respective jobs as located in the following counties of Ohio: Clinton, Greene, Fayette, Licking, Pickaway, and Fairfield, Harrison, Carroll, Scioto, Warren, Butler, Franklin, Jackson, and Brown. (G.C. Exhs. 2-4.) Wage rates in the NPA for those counties are contained within in the "Zone 3" category (Jt. Exh. 1, p. 64.) The "Group 1," "Group 2," and "Group 3" wage rates in a "Zone 3" location, as identified in the NPA are identical to the "Group 1," "Group 2," and "Group 3" wage rates as listed in the Rockford, CBC, and Precision pre-job reports. (G.C. Exhs. 2-4.) While ALJ Goldman placed the pre-job report exhibits under seal at the request of the PLCA, he conditioned his order by stating that the documents may be opened "by agents or personnel as necessary to evaluate and decide the issues in these cases." (TR 343: 17-19.) When the Board examines the pre-job reports, it will find that there are no discrepancies whatsoever between the pre-job reports and the terms of the NPA.

[3] The General Counsel's Brief in Support of Exceptions will hereinafter be cited as "(GC Brief, p. [x])," where [x] refers to the numbered page.

Pre-job reports are simply memorializations of information, the source of which is located in the NPA. *See IBEW Local 1604 (Hulse Elec.),* 273 NLRB 428, 436 (1984). *Accord Operating Engineers Local 150,* 352 NLRB 360, 362 (2008). The wage rates contained within the pre-job reports simply mirrored that contained within the NPA. As ALJ Goldman found, "the record is devoid of evidence suggesting that any of these rates were collectively-bargained or negotiated as part of the pre-job conference," and ultimately "there is no evidence that the pre-job reports are the *source* of any rights for employees." (Id., pp. 13: 44-45 – 14: 19-20.) As to job information which the contractor may establish under the NPA, such information is directly conveyed to the employees by the employer. (ALJ Dec., p. 14: 17-19; TR 335: 6-13; TR 80: 1-25; TR 81: 1-11.) Thus, "the General Counsel proves exactly nothing when he points to particular wage or benefit rates in the pre-job forms he has in his possession and argues that they do not match the wages or benefits listed in the NPA." (ALJ Dec., p. 14: 3-6.) Accordingly, nothing in the record supports the CGC's Exception No. 1.

b. Exception No. 2: ALJ Goldman did not err in concluding that Wiltse and Lanoux have no interest in viewing the Pre-Job Reports.

The gravamen of the CGC's argument in Exception No. 2 is based on the inaccurate argument it makes in Exception No. 1; *to wit*, that the pre-job reports contain "significant terms and conditions of employment" that are not found within the NPA, and as such, the Charging Parties are entitled to the pre-job reports. (GC Brief, pp. 7-8.) For the reasons already enunciated in Section III(a) of this Brief, the pre-job reports are not the source of the Charging Parties' terms and conditions of employment. Therefore, the CGC's Exception No. 2 must fail on this ground alone. It then follows that the CGC's position claiming "[t]he fact that the terms of the NPA are supposed to supersede those of the Pre-Job Reports is meaningless since the unit members, lacking access to the Pre-Job Reports, would have no way of knowing whether there is a conflict

between the two documents (as there clearly is in this case)" (GC Brief, p. 8) is meritless. First, as already established, there is no conflict in terms between the NPA and the pre-job reports. As such, any and all rights can be determined from the NPA or the PLCA member. (ALJ Dec., pp. 13: 44-45 – 14: 19-20.) The employee need only to refer to the NPA to ascertain his or her wages and benefits. And if there are any questions about the terms of employment regarding which the PLCA member is afforded some discretion under the NPA, that are conveyed to the employees directly by the employer. (ALJ Dec., p. 14: 17-19; TR 335: 6-13; TR 80: 1-25; TR 81: 1-11.)

The CGC still inexplicably relies on the Board's decision in *Law Enforcement & Security Officers, Local 40B*, 260 NLRB 419 (1982) to support its Exception No. 2, but that case is applicable *only* to the extent that the pre-job reports are the source of the employee's terms and provisions. *Id*. at 420. ALJ Goldman conclusively distinguished *Local 40B* because the CGC "misreads the holding of that case to claim an expansive but nonexistent 'right' under the Act for employees to receive upon request any paper that might have a term or condition of employment on it—even if that document is not the negotiated source of the term and condition, even when the source of the agreement (the collective-bargaining agreement) is available to employees, and even when the union has sound reasons for not wanting to disclose the document." Rather, based upon the principle that a union's actions are considered arbitrary only if the union has acted so far outside "a wide range of reasonableness' as to be irrational," *Amalgamated Transit Union Local No. 1498 (Jefferson Partners L.P.)*, 360 NLRB No. 96 (2014), quoting *Air Line Pilots Ass'n v. O'Neill*, 499 U.S. 65, 67 (1991) and *Ford Motor Co. v Huffman*, 345 U.S. 330, 338 (1963), *Local 40B* stands for the proposition that a union violates its duty of fair representation when it "offers no reason at all for refusing" to provide its members documents which are the source of their terms and conditions of employment. (*See* ALJ Dec., p. 17: 18-22.)

The CGC provides un-cited proclamations that Mr. Wiltse had "suspicions that he was not being properly represented" when Local 18 did not provide him with a copy of the Precision pre-job reports. (GC Brief, p. 9.) Indeed, Mr. Wiltse never expressed a particular reason to Local 18 as to why he wanted access to the pre-job report. Mr. Wiltse himself agreed, upon learning that the NPA governed his terms of employment, that he no longer needed the pre-job reports as it pertained to his grievance. (G.C. Exh. 7, p. 3.) Mr. Wiltse further agreed that it was only the NPA, which was the sole source of his provisions and conditions of employment, that governed his terms of employment. (TR 192-193.) The CGC does not rebut these irrefutable facts, nor ALJ Goldman's finding that the CGC has utterly failed to explain "what the pre-job report will add to [Wiltse's] consideration of the grievance." (ALJ Dec., p. 15: 15-17.) As to Mr. Lanoux, the CGC fails to cite, and cannot cite, to any part of the record that indicates that Mr. Lanoux wanted the pre-job reports for the Rockford and CBC jobs "to gain some understanding of why his pay and other conditions varied from job to job despite performing the same duties." (G.C. Brief, p. 9.) Mr. Lanoux expressly acknowledged that the source of information he was seeking was solely in the NPA (TR 226: 2-16), of which he stated he received a copy that contained Ohio wage rates pertaining to his job. (TR 227: 5-25; TR 228: 1-10.) Indeed, the CGC does not disagree with ALJ Goldman's conclusion that Mr. Lanoux sought the pre-job reports "purely on principle," a non-reason to request such documentation. (ALJ Dec., p. 15: 17-25.) Where an employee fails to express a legitimate interest in a document that is not the source of the employee's terms and conditions of employment, the union does not act arbitrarily in denying access of that document to the employee. *Mail Handlers Local 307*, 339 NLRB 93, 94 (2003), fn. 7.

Ultimately, the CGC could not, and did not, take exception to ALJ Goldman's subsequent finding that Local 18's "rational rationale for not disclosing the pre-job reports 'on demand' is

unopposed by any serious need articulated by Wiltse or Lanoux." (ALJ Dec., p. 17: 44-46.)[4] As such, "even accepting the proposition that the 'rationality' of the local union's policy must be evaluated in terms of the importance of the requesting employee's interest in the pre-job report, here the employee's interest is unidentifiable[.]" (Id. at p. 15: 9-25; G.C. Exh. 7, p. 3.) Therefore, the CGC's Exception No. 2 must fail.

c. Exception No. 3: ALJ Goldman did not err in concluding that Respondent's refusal to provide Pre-Job Reports to Wiltse and Lanoux was not arbitrary and thus, lawful under the Act.

The CGC's legal argument supporting Exception No. 3 is exclusively based upon *Branch 529, Letter Carriers*, 319 NLRB 879 (1995). (GC Brief, pp. 9-10.) However, as ALJ Goldman found (ALJ Dec., pp. 17: 47-50 – 18: 1-31), *Branch 529* is thoroughly inapposite to the present matter because the union in that case failed to offer *any* reason as to why it was withholding information from its members. *Id*. at 882. *See also Letter Carriers Branch 47,* 330 NLRB 667, 668 (2000). In the instant matter, Local 18 "has articulated a rational reason why it does not provide pre-job reports upon request. I find the reason credible, in other words, I believe it is the reason." (ALJ Dec., p. 18: 24-26.) As established by the record, pre-job reports have remained confidential as between only the pertinent PLCA member, the IUOE, and the pertinent IUOE local union for decades (TR 74: 21-25; TR 323: 14-25 – 324: 1-4; TR 334: 18-25.) In order to guarantee that jobs performed pursuant to the NPA remain competitive with non-union jobs, descriptions of the actual pipe line, the gas company awarding the work, the location of the work, the amount of manpower, the type of equipment used, the benefits provided, the length of the work, and the wages remain confidential. (TR 75: 24-25; TR 76: 1-14.) Release of pre-job reports could potentially end up in the possession of non-union contractors who would have the

[4] Discussion of ALJ Goldman's analysis of Local 18's rational conduct is detailed in Sec. III(c) of this Brief, as it directly addresses the General Counsel's exception that ALJ Goldman erroneously concluded that the Union had acted non-arbitrarily.

ability to extrapolate labor costs for a particular job by examining pre-job report information. The non-union contractors could then apply the data to extremely similar future jobs in the same geographic region, tailor their costs accordingly, underbid estimates put forth by PLCA members, and thus undermine the financial and skill advantages of union jobs. (TR 75: 15-23; TR 319-321; TR 323: 4-13.) Mr. Wiltse acknowledged both the economic harm that would result to Local 18 and PLCA members (TR 187: 10-16), and the "obvious benefit" that his non-union companies would receive if he had access to the pre-job reports. (TR 186: 11-22.) As ALJ Goldman found:

> "[t]he union recognizes that this informal but important cooperation between labor and management would be threatened if the union acceded to the General Counsel's demand to distribute this information on request to any of the 30,000 members who asked for it. The IUOE and the local unions have an interest in the maintenance of the pre-job system and the cooperation and exchange of information it fosters. If the unions must disclose pre-job reports, the PLCA and its contractors fear that the PLCA contractors will obtain each other's pre-job reports and be in a position to underbid each other. This is also legitimate concern for the International Union and local unions too. Moreover, this concern is exacerbated and multiplied for all these parties when one considers the prospect of the pre-job reports being easily obtainable by nonunion contractors through their contact with union members. With the pre-job report "bidding" information in hand, nonunion contractors could look to craft their bids to make themselves more attractive to owners and awarders of construction bids. Obviously, this concern informs the local union's policy of not distributing copies of the pre-job reports on request to members. Bidding is, after all, a competitive process. And, indeed, coincidentally (I assume) one of the [sic] charging party's here operates a small nonunion construction firm. The local union has an obvious and legitimate interest in taking steps to bolster and protect the competitiveness of the unionized contractors and the PLCA members. Whether or not the General Counsel agrees, or would enact the same policy were he operating a labor union, it is not a serious argument to contend that the policy of not distributing the pre-job reports upon requests is irrational or arbitrary." (Id. at p. 14: 27-45.)

The CGC does not take exception to the ALJ's reasoning on this point. Indeed, "[t]he General Counsel's position – in which a presumed "right" of the employees to the union's information trumps the union's rational motivations for refusing to disclose the information – is

unmoored from the Supreme Court's teachings on the duty of fair representation." (ALJ Dec., p. 15: 39-42.) Rather, as ALJ Goldman found, "[i]t is enough that the Respondent's concerns about disclosure of the pre-job reports are credible, rational, and nonarbitrary." (ALJ Dec., p. 16: 7-8.) For these reasons alone, the CGC's Exception No. 3 should be overruled.

However, it bears noting that to the extent it somewhat extends its prior misguided argument under *Branch 529*, the CGC flagrantly misrepresents and distorts the record. As to the first factor under *Branch 529*, for reasons already enunciated, the Charging Parties offered no sincere reason as to why they were entitled to the pre-job reports. G.C. Exh. 7, p. 3; TR 226: 2-16; TR 227: 5-25; TR 228: 1-10.) As to the second factor under *Branch 529*, the CGC states that the Charging Parties have a general interest in the pre-job reports because they should know what the terms and conditions of their employment are. However, as has been repeated time and time again, the pre-job reports are *not* the source of such information; any such information is exclusively contained within the four corners of the NPA. (TR 68: 1-15; TR 301: 4-6; Jt. Exh. 1, pp. 36-74.) *See IBEW Local 1604 (Hulse Elec.)*, 273 NLRB at 436; *Operating Engineers Local 150*, 352 NLRB at 362. As to the third factor under *Branch 529*, the CGC states that the Charging Parties effectively communicated their desire for the pre-job reports. However, as ALJ Goldman correctly found (ALJ Dec., p. 15: 15-25), and as elaborately explained in Sec. III(b) of this Brief, their desire was based on a completely non-legitimate need to access them, and as such, the clarity of their expressed desires is immaterial. *Mail Handlers Local 307*, 339 NLRB at 94, fn. 7. As to the fourth factor, the CGC contends that Local 18 failed to express any countervailing interest in not sharing the pre-job reports with the Charging Parties until the hearing. This is false, as Local 18 expressed its interest in withholding the pre-job reports due to confidentiality concerns prior to the hearing. (TR 16: 3-12.) Rather, as ALJ Goldman found:

> "[T]here is no basis in law or logic for the General Counsel's implicit argument that the evaluation of the Respondent's reasons for not providing the pre-job report must be limited to the reasons that the Respondent's representatives gave to Lanoux and Wiltse. Essentially, these representatives told Wiltse and Lanoux that pre-job reports were not given out to members and in Wiltse's case, explained why the pre-job report had no relevance to his grievance. That the representative failed to provide, or perhaps, did not know the full explanation of why the Respondent and the International Union regularly refused such requests does not undermine the legitimacy of the Respondent's full policy rationale offered at trial. In any organization, policies and practices often have legitimate origins and explanations with which the front-line personnel may be unfamiliar. They execute the policies, without explaining and perhaps without knowing their full import. The relevant issue is whether the rationale for not providing the reports that was offered at trial is credible. I believe it was credibly offered." (ALJ Dec., p. 19: 9-20.)

As to the fifth and sixth factors, the CGC's argument that the Union could in fact provide the pre-job reports, and that it would present no difficulty to do so completely ignores the undue economic hardship that Local 18 seeks to avoid by maintaining the confidentiality of the pre-job reports. (TR 75: 15-25 – TR 76: 1-14; TR 319-321; TR 323: 4-13.) And the CGC's argument is again entirely premised on the false position that, once again, the pre-job reports are akin to collective bargaining agreements. As ALJ Goldman stated, under relevant Supreme Court and Board jurisprudence contained in *Amalgamated Transit Union Local No. 1498 (Jefferson Partners L.P.)*, 360 NLRB No. 96 (2014), *Air Line Pilots Ass'n*, 499 U.S. at 67 (1991), and *Ford Motor Co.*, 345 U.S. at 338, because he found credible Local 18's "rational reason why it does not provide pre-job reports upon request," the Union did not act arbitrarily. (ALJ Dec., pp. 18: 24-26.) Because the CGC neither addressed nor attacked Local 18's confidentiality concerns, and as the clear preponderance of all the relevant evidence demonstrates that ALJ Goldman's credibility assessments are sound, the Board should accept and adopt them. *E.g., ILA Local 51*, 294 NLRB 674, 674 (1989), fn. 1. Accordingly, the CGC's Exception No. 3 lacks merit.

d. Exception No. 4: ALJ Goldman did not err by characterizing the CGC's argument as requiring that Respondent provide Pre-Job Reports to any of its 30,000 members on demand.

While the CGC emphasizes that its remedy only consists of the Charging Parties having access to the pre-job reports, ALJ Goldman recognized that the ramifications of such a remedy would effectively result in all members of the bargaining unit having access to the pre-job reports without being required to articulate any particular reason for seeking their possession. That is, neither Messrs. Wiltse nor Lanoux could express a legitimate reason as to why they sought the pre-job reports. (G.C. Exh. 7, p. 3; TR 190-194; TR 226: 2-16; TR 227: 5-25; TR 228: 1-10.) Thus, if they were awarded access, any bargaining unit member could offer any reason as to why they are entitled to the pre-job reports. There is nothing in the Act that prohibits a union from withholding information from an employee where the promulgation of such information to its members would harm the economic opportunities of the union's membership. *See Carpenters Local 102*, 317 NLRB 1099, 1108 (1995). Therefore, there are no grounds to support CGC's Exception No. 4.

e. Exception No. 5: ALJ Goldman did not err by failing to recommend the issuance of an order requiring that Respondent supply Stephen Wiltse and Gary Lanoux copies of Pre-Job Reports as requested and post a Notice to employees.

Contrary to the CGC's contention, the evidence and its application to relevant Federal and Board law demonstrates beyond surfeit that Local 18 did not act arbitrarily, and therefore did not violate Section 8(b)(1)(A) of the Act, by refusing to provide the Charging Parties with copies of the pre-job reports. Thus, the CGC's Exception No. 5 is without merit, and ALJ Goldman properly dismissed the complaint.

IV. Conclusion

Based on all the foregoing, Local 18 respectfully requests that the Board uphold ALJ Goldman's Decision and Recommended Order.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

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